In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 304

CONTINENTAL ORE COMPANY, a Partnership, and HENRY J. LEIR, ERNA D. LEIR, LINA SCHLOSS, as Individuals and as Partners under the trade name and style of CONTINENTAL ORE COMPANY, *Petitioners*,

vs.

UNION CARBIDE AND CARBON CORPORATION; UNITED STATES VANALIUM CORPORATION; ELECTRO METALLURGICAL SALES CORPORATION; ELECTRO METALLURGICAL COMPANY OF CANADA, LIMITED; VANADIUM CORPORATION OF AMERICA, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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I

PRELIMINARY STATEMENT.

In their briefs, respondents initially attempt to reframe the questions on which this Honorable Court granted certiorari so as to fit their arguments. Nowhere in their briefs do respondents point out where these questions misstate the issues presented by the record and the opinion of the Court below. And nowhere in respondents' brief in opposition to petitioners' Petition for a Writ of Certiorari did respondents even suggest that petitioners misstated any issue presented by the record, which would seem to be the proper place to raise such an objection.

Secondly, respondents attempt to create the impression that basically this is a "fact" case, pure and simple. Nothing could be further from the truth. Each question set forth in the writ of certiorari presents a serious question of law, one of these questions going to the basic right of a litigant to have all issues decided by the trier of fact and not summarily by an Appellate Court.

Respondents persist in an artful refusal to view the evidence steadily, to view it whole and to consider it in the light that an Appellate Court is required to consider the evidence in determining whether the case should be removed from the jury and decided on a peremptory directed verdict.

This Court has recently expressed a disapproval of peremptory rulings by Courts which take anti-trust cases away from the jury. *Poller v. Columbia Broadcasting System, Inc.* ..... U.S. ....., 82 S.Ct. 486 (1962); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Radovich v. National Football League*, 352 U.S. 445 (1957).

Respondents' factual statement and petitioners' factual statement show that there was a serious factual conflict on the issue of causation. This conflict is emphasized by a reading of the Appellate Court's opinion.

Under a factual situation such as presented in the instant case, the cases of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) are controlling. Nowhere in their briefs have respondents offered any sound distinction between the case at bar and the *Story Parchment* and *Bigelow* cases.

Under these cases a conspirator is held responsible for the results which he *intends* to occur by his illegal acts and which do in fact occur.

The most recent statement of this principle occurs in *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, (6 Cir. 1961) 298 F. 2d 356. In that case the Court stated (p. 359):

> "In the usual anti-trust case, proximate cause may present the problem of whether the plaintiff was within the 'target area' of the proscribed activities. Karseal Corporation v. Richfield Oil Corporation, 221 F. 2d 358 (C.A. 9, 1955). But, certainly this can be no problem *here*, where the defendants' acts were admittedly aimed only at the plaintiff broadcasting company."

In the instant case there is no question that petitioners were in the "target area". Burwell admitted that his instructions from his superiors were to eliminate *all* possible competition, and, specifically, he testified that the only reason that Carbide would not sell vanadium to Mr.

Leir was "they wanted to keep him out of the vanadium business. No other reason" (R. 547). Bransome, president of VCA, substantiated this exclusionary policy toward petitioners when he told Burwell that they were trying to keep Mr. Leir out of the vanadium business. (R. 225-226.)

Pursuant to this intent, these "assumed" conspirators performed all the predatory acts set forth in Petitioners' Opening Brief at pages 18 to 63.

In their factual statements, both respondents have made misstatements of the record which should be corrected immediately, so that there will be no confusion as to the questions presented.

1. The Court below "assumed" for the purposes of its opinion that "the evidence was adequate to support a jury finding that the defendants committed the violations of the Sherman Act claimed, and that the defendants did the acts mentioned as part of a plan to monopolize the marketing of ferro-vanadium." (R. 2572.) The Court then stated specifically that its "problem" was "to determine whether or not the evidence could have justified a jury's finding that defendants' illegal acts were in fact the cause of plaintiffs' failure in various adventures into the business of producing and selling ferro-vanadium and Van-Ex." (R. 2572.)

Therefore, there is no question that the opinion "assumed" or "admitted" for its purposes that respondents had violated the anti-trust laws and "did the acts mentioned as part of a plan to monopolize" the ferrovanadium industry. At page 5 of its brief respondent VCA

concedes this. Respondents' attempts to engage in a battle of semantics as to whether the lower Court "assumed" or "admitted" that they violated the anti-trust laws and monopolized the vanadium industry is just an attempt to introduce a non-existing issue.

2. There is no denial by respondents that, except for the ill-fated challenge by petitioners, they, at all times herein pertinent, maintained a 100% two-company monopoly of ferrovanadium.

3. Blair Burwell, without any doubt whatsoever, was USV's chief executive officer and the directing force behind all of Carbide's activities on the Colorado Plateau. His impressive qualifications are set fully at page 16, footnote 3, of Petitioners' Opening Brief. Carbide's attempt to disown him as "Leir's friend" is childish, an abandonment that even their co-conspirator VCA could not swallow. (See VCA Brief, page 4, footnote 3.) The contemporaneous documents and correspondence, letters from Carbide's files, fully support Burwell.[1] Such letters were written long before Mr. Leir came to the United States.

4. Respondents refuse to recognize that the elimination of petitioners was but a facet of respondents' overall conspiracy to monopolize all phases of the vanadium industry. This overall conspiracy certainly was "confessed" by Burwell in no uncertain terms. *Union Carbide*

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[1]See *Union Carbide & Carbon Corp. v. Nisley*, (10 Cir. 1962) 1962 Trade Cases, paragraphs 70, 222, p. 75, 805 at 75, 831, where the 10th Circuit Court, in speaking of Mr. Burwell, states "While these incriminating statements may have been apocryphal, no one familiar with this record can doubt the power and ingenuity of the responsible maker of the statements to make good his boast."

and Carbon Corp. v. Nislay, (10 Cir. 1962) 1962 Trade Cases para. 70, 222, p. 75, 805, clearly sets forth this overall conspiracy and the various violations of the anti-trust laws utilized by respondents to monopolize all phases of the industry.

With these preliminary statements, we proceed to answer respondents' arguments.

II

RESPONDENTS HAVE NOT ANSWERED QUESTION 1 OF THE WRIT GRANTED BY THIS COURT.

A. The action involves exclusion of actual competition.

1. There existed an exclusionary conspiracy to monopolize.

Nowhere in their briefs have either of the respondents met or answered petitioners' contention that the decision below is in direct and basic conflict with the purposes of Congress in establishing liability on those who conspire to monopolize, with the decisions of this Court which have rejected the determination of "legal cause" as a matter of law in Sherman Act litigation and which allow damages to those who suffer from the *natural consequences of wrongful and intended acts.*

We must start with the following facts which are now not seriously challenged.

1. Respondents committed violations of the Sherman Act as claimed in the complaint.

2. Respondents did all the acts mentioned by petitioners in their complaint as part of a plan to monopolize the marketing of ferrovanadium.

3. Burwell, the chief executive officer of USV, testified directly that Carbide, one of the conspirators, had as its purpose and intent the exclusion of all independent and potential sources of supply for petitioners. See Petitioners' Opening Brief, pages 28 to 36.

In this connection, Mr. Burwell testified that pursuant to his instructions to eliminate all potential competition he eliminated:

1. *Anaconda Copper Co.*: He purchased its production only "to keep it off the market" (R. 297);

2. *Gateway Alloys*: "We wanted to keep another vanadium operation from getting started" (R. 292-293);

3. *Mesa Vanadium Mill*: The entire mill was acquired by USV "to keep it out of production" (R. 303);

4. *Durango Mill*: This mill was acquired because "we wanted the plant to keep control of the production of vanadium" (R. 246);

5. *Nisley & Wilson Mill*: For the predatory practices instituted against this mill, see Petitioners' Opening Brief, pages 35-36; 46, and *Union Carbide & Carbon Corp. v. Nisley, supra*;

6. *Loma Mill*: USV commenced purchasing unneeded ore located in this mill's tributary areas to keep the ore "away from this mill" (R. 303-306);

7. *Mammoth St. Anthony Mining Co.*: Burwell purchased its production to "keep it off the vanadium market" in the United States (R. 178);

8. *Blanding Mines*: See Petitioners' Brief, p. 34;

9. *North Continental Mill:* Turned into an ore buying station (R. 134, 121).

4. Burwell testified that there was an admitted policy on the part of respondents to exclude petitioners. (Petitioners' Brief, pages 36 to 39.) In this respect, Burwell testified that Carbide "did not want to sell vanadium to Mr. Leir because they wanted to keep him out of the vanadium business. No other rea. n." (R. 547.) And Burwell testified that in a meeting with Mr. Bransome, chief executive officer of VCA, a proposed operation was not sanctioned because "that would put Mr. Leir in the vanadium business and that is what we are trying to keep him out of." (R. 225-226.)

5. There was substantial evidence that respondents interfered with every source of supply available to petitioners and with their manufacturing associates. (Petitioners' Brief, pages 39 to 56.)

6. Both respondents consistently refused to sell vanadium oxide to petitioners. (Petitioners' Brief, pages 56 to 63.)

7. Petitioners, who were successful in other fields of metals and alloys, were in fact required to leave the vanadium industry.

The sum total of the evidence then is that respondents had entered into a conspiracy to monopolize the vanadium industry at all its levels, that as a part of this conspiracy they had as their intention the premeditated elimination of all competition, that they in fact eliminated all independent sources of supply and all mills that could pos-

sibly nurture an independent vanadium operation, that there was a policy in both companies to prevent petitioners from entering or remaining in the vanadium industry, that executive officers of both companies stated that they did not want petitioners in the vanadium industry, and finally, that petitioners were in fact caused to leave the vanadium industry. The end result is that which respondents intended to occur by their company policies and practices in violation of the antitrust laws did occur. *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.* (6 Cir. 1961) 298 F.2d 356.

Certainly an intentional wrongdoer is to be held liable in the Courts for all the natural consequences of his intended acts. He cannot be heard to say that the precise manner of the capitulation of sources of supply or manufacturing associates was not foreseen, having embarked on a program which insured that these sources and associates would fall. Respondents have made no real answer to the application of ordinary rules of proximate cause. Rather they misstate the issue as one in which a competitor seeks damages only upon proof of violation; that the case at bar involves no acts of impact or contact or natural tendency to cause harm, the proof of which establishes liability. But in contrast to the legal explanation of the issue before the Court, the respondents in their factual statement only seek latter-day excuses for conduct which would crush any competitor. The logical and rational answer is simply that the respondents would not have done the acts proven here had they been assured of the demise of these petitioners for other reasons. But the issue is one of fact for the jury.

As stated by this Court in *Wilkerson v. McCarthy*, 336 U.S. 53 (1949):

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Under respondents' interpretation of the *Eastman Kodak*, *Story Parchment* and *Bigelow* cases, as a matter of law there can be no recovery without proof of a complete inability to proceed in market entry during every moment of the conspiracy's march to a complete one hundred percent monopolization. Thus respondents look upon the fact that petitioners did receive some independent oxide production as a great insulator from liability despite the showing that the failures of these very suppliers were attributable to illegal practices of the respondents in their preemption of the field.

Respondents would further categorize *Bigelow* as not really a causation case. But this Court stated:

> "Hence, it is said, petitioners' evidence does not *establish the fact of damage*; and that further, the standard of comparison which the evidence sets up is too speculative and uncertain to afford an accurate measure of the amount of damage.
>
> • • •
>
> In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the

> proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' *wrongful acts had caused damage* to the plaintiffs." (327 U.S. 263-264.) (Emphasis added.)

But the petitioners were not bound to show a complete inability to obtain all supplies.

In *Standard Oil Co. v. United States*, 221 U.S. 1, (1910) it was held that defendants' failure to control crude oil and the abundance of said oil showed *not* that there was little chance of success for monopolization, but rather that control of the refined product as a matter of law carried with it control of the field. (Id. at 77.)

In *Associated Press v. United States*, 326 U.S. 1 (1945) this Court rejected the argument that the availability of alternative news supply justified exclusionary by-laws.

American Tobacco Co. v. United States, 328 U.S. 781 (1946) established that in a Section 2 case it is not necessary to establish power and intent to exclude *all* competitors, or to show a conspiracy to exclude *all* competitors.

In *W. W. Montague v. Lowry*, 193 U.S. 38 (1904) it was held that a combination could *not* claim that there was no showing of injury simply because the competitor could easily join the defendants' association, and that a combination could not assume the right to tell businessmen how to exercise their right to compete.

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) the ability of the plaintiff to obtain a competitive line did not prevent the award of

extensive damages arising from the loss of the Kodak line even though it was urged that the evidence showed that the total business of the plaintiff earned more money after the loss of the Kodak line.

In *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U.S. 255 (1940) it was held that plaintiff need not aver that he was wholly unable to buy posters in order to claim damages under the anti-trust laws.

In *Keifer-Stewart Co. v. Joseph E. Seagrams & Sons*, 340 U.S. 211 (1950) recovery was allowed against two conspirators in spite of the availability of dozens of other available liquor supplies.

In *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959) the right to a trial by a trier of fact was allowed despite the availability of alternative brands to a household appliance dealer.

Thus, in the instant case, the fact that there were some vanadium oxide millers available which were utilized by petitioners to their best business judgment does not in any manner allow these respondents to claim as a matter of law that their conspiracy's progress did not harm petitioners. The proof in this case showed that these independent oxide millers, i.e., Gateway, Morrison, Blanding, Nisley and Wilson and finally North Continent were all thwarted in their production of oxide by the conspiracy itself. The fact that in a given month, in a given time, petitioners had some supply available to them simply converts the action from one based on attempts to enter the market without the opportunity to have any contacts allowing entry, into one of exclusion of an actual com-

petitor. See *William Goldman Theatres, Inc. v. Loew's, Inc.* (3 Cir. 1945), 150 F.2d 738, involving a refusal to sell first run pictures causing plaintiff's theatre to remain closed, in which the Court allowed extensive damages for the closing of a first run theatre which could have acquired lesser runs.

2. Respondents were bound not to conspire to refuse to deal with petitioners and each was required to sell oxide.

Respondents further urge that petitioners rejected plans from independent millers and others to expand their production or to open a new venture.

These offers from independents, even if any were made, patently have no materiality to the legal principle that respondents were themselves under an obligation to deal with petitioners, to sell them oxide, and not to discriminate against them. The record showed that respondents were monopolists. Union Carbide possessed 77% control of the domestic supply of vanadium oxide (Pl. Ex. 136, R. 1253), VCA held 64.7% of the sales of ferrovanadium. (Pl. Ex. 138, R. 1256.) As monopolists, respondents were under a duty to deal with petitioners and not to discriminate against them. *United States v. Aluminum Co. of America* (2 Cir. 1945), 148 F.2d 416; *United States v. Griffith*, 334 U.S. 100 (1948). But such was not done in the instant case. The record shows blatant discrimination. VCA was being supplied its vanadium oxide needs by its co-conspirator Union Carbide at below market prices. (Pl. Ex. 8, R. 2073-2074, 117; Pl. Ex. 46, R. 2128, 294; Pl. Ex. 150, R. 2340, 1583.) Yet petitioners' requests were consistently denied. (Table, Pet. Op. Br., p. 59.)

3. The so-called "lost opportunities" were in fact excluded by illegal means.

Once respondents had entered into their cartel arrangement of mutual assistance, they were in no legal position to demand that competitors, targets of their conspiracy, finance new mills or enter into hazardous expansions, especially when existing independent mills were being eliminated by the monopoly. *United States v. Aluminum Co. of America* (2nd Cir. 1945), 148 F.2d 416; *Gamco, Inc. v. Providence Fruit & Produce Bldg.* (1st Cir. 1952), 194 F.2d 484; *American Federation of Tobacco Growers v. Neal* (4th Cir. 1950), 183 F.2d 869.

For example, respondents claim that the National Vanadium Corp. was an opportunity which petitioners failed to utilize for an independent source of oxide. (VCA Brief, p. 32; UCC Brief, p. 34.)

But at the time respondents claim petitioners should have utilized this company as a source of supply, it was writing to Mr. Leir:

> ". . . You will probably not be surprised to hear that the U.S. Vanadium Corp. are endeavoring to tie up our product if we are successful and also to block us in every way possible if we do not line up with them." (Df. V.'s Ex. V-1-Q, R. 2508.)

The other alleged "lost opportunities" i.e., Blanding, Morrison [Loma] and Ackermann (VCA Brief, p. 32; UCC Brief, pp. 32-33) were shown to have been directly thwarted by the respondents. See Petitioners' Opening Brief pages 34 to 46 for the evidence as to how these mills were eliminated by respondents.

Respondents cite no authority for their proposition that conspirators to a monopolization can defend an antitrust action by showing that the excluded competitor did not invest in all offers to deal. Actually the law is directly to the contrary for monopolists cannot extract a monopolist's advantage. *Associated Press v. United States*, 326 U.S. 1 (1945).

B. The record contained numerous acts of impact or contact on manufacturing associates and a successful monopolization which prevented the entry into the vanadium industry with substitute raw materials or oxides.

1. **APEX: The destruction of the independent mills and respondents refusal to deal with petitioners caused a lack of supplies to Apex and its failure, thereby depriving petitioners of a manufacturing associate.**

Respondents represent in their briefs that Apex, throughout its operations, had all the oxide it needed and that a plentiful additional supply was available to it. (VCA Brief, p. 30.) They claim that Mr. Leir and Apex erred in not stockpiling oxide prior to the start of the Apex contract in August or September, 1940. Respondents claim that Mr. Leir was wrong in recommending that the 20,000 pounds of oxide expected to come from Blanding in September and October be resold. (Id. p. 31 citing Df. V.'s Ex. V-1-J, R. 2498-2499.) But Mr. Leir expected to obtain production from the Rifle mill and two new expected mills in Arizona and Los Angeles. (Id.) Neither was able to produce oxide. (Pl. Ex. 18, R. 134, 125. Note: The Rifle mill shown thereon as the USV Rifle plant is not the small plant referred to in Mr. Nisley's testimony, R. 639.) In 1941 only de minimis sales of oxide were made to others. (Pl. Ex. 119, R. 2212, 1065.)

In respect to the Apex association, respondents also claim that petitioners did not really request oxide at all from the respondents and if they did, they did not "follow" these requests through. (VCA Brief, pp. 32-33.) This is completely contrary to the record. A request to do business with Electromet was made in June 14, 1941. (Pl. Ex. 77, R. 176-177, 776.) This was followed by a request that petitioners be allowed to convert oxide for the account of respondents. (Id., and Pl. Ex. 132, R. 2261-2262.) This was followed by a request through OPM that respondents sell petitioners oxide. (Pl. Ex. 132, R. 2265.) It is manifest that the petitioners were "following up" their requests. It is also important that petitioners never did get their supplies.

Next, we are told by respondents that Shattuck or North Continent was gutting Apex with supplies of between 12,000 to 18,000 pounds of oxide every couple of weeks in October, 1941. (VCA Brief, p. 34, citing Df. V's Ex. V-1-S; R. 1155-1157.) But the record showed that in September, 1941, Apex informed petitioners that it was not getting a sufficient quantity of oxide to run facilities *on half time*. (Df. V's Ex. V-1-Q; R. 2512A.) The record also shows Apex was refused supplies by respondents and was turned down by the respondents after positive requests through the OPM were scoffed at by the respondents. The record shows that nevertheless petitioners persisted in their efforts to acquire oxide as did Apex (R. 1158) and that during October to December, 1941 there was a frantic but futile attempt by petitioners to obtain necessary oxide supplies for their Apex arrangement. (Pl. Ex. 144, R. 2266, 1313; Pl. Ex. 145, R. 2270, 1315; Pl. Ex. 146, R. 2271, 1320.)

In its Brief, respondent VCA conveniently skips these requests for oxide made during the period October to December, 1941, just prior to Apex's capitulation. It relegates these important requests to footnote 16. (VCA's Brief, p. 34.) Respondents simply do not come to grips with the admissions by Apex which appear in this record that Apex specifically told the United States government agencies in requesting oxide that the reason for the fact they were not producing at capacity was *because of lack of raw material.* Respondents seek to weaken the effect of this testimony by citing statements by Mr. Bayer to claim that these referred to "future operations" and "distant date". (R. 1358.) But the record shows that Mr. Bayer specifically testified that Apex was not operating at full capacity because of lack of raw materials. The record shows:

> "Q. Well, now, specifically, the statement that you make in that letter with respect to not operating full capacity because of a lack of raw materials, that statement was true when you made it, was it not, sir?
>
> A. As far as I know, yes." (R. 1319.)

Also, it is to be remembered that 50,000 pounds of oxide on hand would still be only one half of estimated capacity for one month, because the oxide ratio is about two pounds for one pound of V. (Pl. Ex. 146 at R. 2275.)

In this respect, neither respondent has shown that petitioners ever had a steady, dependable source of supply. Certainly, sporadic shipments which got away from respondents or which they made available at strategic times when their activities had eliminated petitioners' customers

cannot protect them from the obvious implications of the testimony in this record that respondents conspired to eliminate all sources of supply and were successful in this respect.

Respondents claim that the VCA-Apex arrangements involved only the offer of equipment by Apex to VCA. (VCA's Brief, pp. 35-36.) The memorandum of April 14, 1942 (Pl. Ex. 62, R. 168), clearly shows that Apex offered VCA the names of its suppliers and promised to stay out of the vanadium business. The statement appearing in the memorandum that "He further stated that he would furnish us with the names of all their suppliers of Ores and Oxide, the principal ones apparently being Shattuck Chemical Company and Nisley & Wilson" creates an inference this information was supplied by Apex after VCA's request and shows that Mr. Christiansen was being examined as to Apex's future course of conduct. The inference is clear that upon being satisfied with the fact that Apex would stay out, "We had an interesting discussion concerning low copper grained aluminum . . ." (Id., R. 169.) It must be remembered that the negotiations were being pushed by VCA with Apex at a time when Apex had a binding legal 14-year contract with petitioners.

The purpose of these meetings is clear from the letter from Mr. Sterling (VCA) to Mr. Kett (VCA), wherein Mr. Sterling states (Pl. Ex. 62, R. 166):

> "Apex Smelting Co.—It is nice we won't have to worry about them after July 1st." (R. 166.)

In their opening brief, petitioners felt that the implications of this transaction were obvious. However, in view

of respondents' attempt to rationalize this transaction as an innocuous sale of equipment, petitioners feel it should be characterized for what this transaction actually was, a commercial bribery which had as its reward Apex's withdrawal from the vanadium industry and its abandonment of its relationship with petitioners.

Respondents would also ignore the devastating effect on Apex caused by Apex's loss of the Blanding production. The contemporaneous letters of Mr. Leir and Apex show that this was a crucial matter to Apex. Mr. Leir wrote Mr. Bigler on January 6, 1942:

> "In any case, we wish to say that it is of course the tendency of the U.S. Vanadium and the Vanadium Corp. of America to firmly establish their monopoly by getting hold of all sources of vanadic acid, so as to impede the operations of their sole competitor, the Apex Smelting Company." (Pl. Ex. 131, R. 2237.)

Six days later, on January 12, 1942, Apex wrote to Blanding:

> "We have your letter of January 9th, and we regret exceedingly to note that you are compelled to dispose of your material in your district, as we enjoyed doing business with you, and we were looking forward *to receiving increased amounts from you.*" (Pl. Ex. 131, R. 2239.) (Emphasis added.)

In February 23, 1942, Blanding wrote to Apex that "We regret that we are unable to sell our product to you, however, you are aware of our set-up and the fact that we are merely operating under a lease". At that time Apex, it may be inferred, knew that Blanding was talking of VCA. (R. 2241; Pl. Ex. 131, R. 2237, 1242; Pl. Ex. 157, R. 2341.

1791.) The tactics used by VCA to acquire this lease, and thereby corral the Blanding production for VCA, eliminate Blanding as a supplier to petitioners and Apex are set forth in Petitioners' Opening Brief at page 34.

So it was that Apex could not continue, being faced with losses in a business which had inadequate supplies to permit it to operate successfully. (Pl. Ex. 144, R. 2266, 1313; Pl. Ex. 145, R. 194, 1315; Pl. Ex. 146, R. 2270, 1320; Df. V.'s Ex. V-1-Q, R. 2512A, 1145; Bayer, R. 1301, 1302, 1305, 1313, 1319; Leir, R. 1070, 1079.)

After the loss of Apex, petitioners were never able to arrange for the production of ferrovanadium on a sound dependable basis.

2. **CLIMAX: The proof of an existing contractual arrangement with Climax supports the inference that continued production would have been sustained but for respondents' threats of reprisal.**

The record contained proof of continued acts of impact and contact on petitioners' business after the loss of Apex. Petitioners offered to prove that they were told to stay away from Climax by Union Carbide, who, in this respect, engaged in the boldest kind of conduct in restraint of trade. It is no answer to say that there was no evidence of the effect of this threat when it is admitted that prior to the threat, petitioners had entered into an arrangement with Climax under which Climax was to produce 20,000 pounds of ferrovanadium for petitioners' account. (Pl. Ex. 111, R. 182, 1014.) Since the boast of the respondents is that they supplied 10,000 lbs. of vanadium oxide for this toll milling, it would be only honest for them to explain why if Union Carbide was so helpful in supplying

the 10,000 lbs. they could not continue to supply petitioners. Instead, respondents attempt to direct this Court's attention to an argument that petitioners did not show that the threat was successful. Yet the threat by Carbide was coupled with a point blank denial by Electromet, its subsidiary, to supply petitioners with 10,000 lbs. of V contained in pentoxide per month. (Df. U's Ex. U-4-M, R. 581, 955.) The record shows that in 1943, a year of great demand for ferrovanadium, in a period when sales were no problem, petitioners were able to sell only 10,000 lbs. of ferrovanadium for the obvious reason that they had no production to sell. (Pl. Ex. 119, R. 2212, 1089.) We are told by respondents that not a single piece of paper suggests that the threats were ever carried out. (VCA Brief, p. 40; UCC Brief, p. 54.) But a threat of reprisal is completed when the threat is made to the competitor. The threat is a completed overt act illegal in itself under the antitrust laws. *United States v. Kissel*, 218 U.S. 601 (1910). As part of a continuing conspiracy it is pro tanto injurious. *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.* (1 Cir., 1932), 57 F.2d 96.

3. **IMPERIAL: The specific reason assigned by Imperial for its unwillingness to produce ferrovanadium was its inability to obtain ample sources of vanadium-bearing materials.**

The ultimate significance of Imperial's refusal to produce vanadium products is that it, a leading American corporation, corroborated petitioners' contention that entry into the vanadium industry required a steady, certain, dependable source of supply. Imperial wanted dependable sources "from whom we can always obtain vanadium bearing materials at a price which will enable

us to manufacture." (Pl. Ex. 114, R. 185, 1022.) On December 5, 1944, Imperial wrote to petitioners:

> ". . . we would have to have more confirmation than we have been able so far to obtain that there are, and always will be, ample sources of vanadium bearing material, . . ." (Id., R. 185.)

Later, on April 5, 1945, Imperial stated:

> "The viewpoint we have now is that this whole production of Vanadium Oxide is dependent largely upon having a satisfactory source of supply of raw material in sufficient volume." (Pl. Ex. 115, R. 2179, 1023.)

Imperial was interested in making both its own vanadium oxide and ferrovanadium or in making the ferrovanadium from vanadium oxide purchased at a higher market price. (Pl. Ex. 115, R. 2181.)

Bodies of vanadium bearing ores were known to Imperial, but these offered no substitute for an assured, dependable source of uniform ores or oxides. (Wolf, R. 883-884, 891.) The basic fact is that the monopolization of the Plateau had reduced the petitioners and Imperial to exploring all sorts of alternatives which Imperial found to be so inadequate, undependable and insufficient that it could not enter into the vanadium business. The monopolization thereby was a complete success. Control of the basic American mills and ore supply gave respondents control over the vanadium industry in much the same fashion that control over the virgin aluminum ingot ore gave the Aluminum Co. control over the seconds market. *United States v. Aluminum Co. of America* (2 Cir. 1945), 148 F.2d 416.

The other sources of vanadium supplies were shown not to be a substitute for respondents' monopoly power, which in 1943 was 100% in both the domestic millsite production of vanadium oxide and ferrovanadium. The rejection of production by Imperial then also answers the other possibilities respondents claim were open to Leir. (VCA Brief, p. 43.) Respondents' citation to Ex. U-4-B, R. 936-937 shows that in January 1944 the only material available to petitioners was 50,000 lbs. of oxide without possibility of any more. Petitioners deemed that the blocks or lumps of oxide at Durango mentioned in this memorandum would not be ground by Carbide. (Id.)

4. **DURANGO:** Petitioners have always asserted that the acquisition of the Durango mill interfered with the development of the plans of the independents to form an association.

In their briefs respondents claim that petitioners are now for the first time claiming interference with the forming of an independent association on the Plateau by Leir and other independents. (UCC Brief, p. 56; VCA Brief, p. 43.)

In Petitioners' Opening Brief in the Ninth Circuit it was asserted, at page 28:

> "Mr. Leir attended meetings in March, 1944, with independent operators with respect to an independent mill site on the Colorado Plateau. (Tr. 1774-1780; see Plfs' Ex. 158, dated March 17, 1944, Tr. 23533). Nothing could be materialized."

And in their Reply Brief in the Ninth Circuit petitioners urged the same matters appearing at page 28 of their Petition for a Writ of Certiorari in this Court. It was expressly stated,

"In so doing they thwarted Mr. Leir's plans to form an independent cooperative association of miners and millers."

The record is clear that respondents learned of the meeting of Leir, Bigler, Sitton and others in the middle of February, 1944. (Df. V's Ex. V-2-K, at R. 2536.) Bigler specifically remembered that Sitton was at this meeting, which included the discussion of the formation of an association and the building of an independent mill. (R. 1776.) USV sought to discourage any possibility that Brinker (Blanding) and Sitton would have to acquire the Durango mill. The wire from Burwell to Haldane advising him that Brinker and Sitton were planning to acquire the Durango plant is dated February 29, 1944. (Pl. Ex. 37, R. 148, R. 243.) Burwell specifically testified under oath that the only reason for the acquisition of the Durango mill was to keep control of the production of vanadium and to keep outsiders out of the vanadium business. (R. 246.)

The record, taken as a whole, shows that respondents were always at the opportune place at the opportune time to preempt competition and to stifle any competitive operation which was showing any signs of succeeding. However, respondents claim these preemptions affected no one and had no effect on the market place. Yet these preemptions resulted in the complete effective domination of the market and the forestalling of all competition as condemned by the *Aluminum* case, which was affirmed by this Court in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

Each passing year showed the elimination of competitive opportunities. First petitioners' suppliers were lost in 1940, 1941. Then petitioners' associate, Apex, was lost. Then during 1942 to 1944 all the independent mills were thwarted on the Plateau. And finally petitioners had to rely on Imperial's undertaking the production of vanadium oxide and ferrovanadium from sources outside the United States because of respondents' monopoly power. (R. 896.) This substitute was held by Imperial to be futile. There is no question that by 1945 respondents had successfully eliminated any possibility of manufacturing oxides and ferrovanadium in competition to them.

C. The proof of damages or the attempted proof of damages by petitioners complied with applicable law.

The history of petitioners' business was offered.

Respondents now for the first time assert that petitioners have avoided and omitted all pertinent evidence relating to the asserted loss of sales and profits. (Brief of UCC, p. 57 et seq.) Much effort is made by respondents to show that petitioners did not prove they lost sales. But petitioners proved much more. Petitioners proved that they lost their manufacturing associates and were excluded from all aspects of an industry, i.e. production, distribution and sales.

Respondents also assert petitioners failed to show net profits and that there was a failure to allocate operating expenses. But petitioners showed that their business was comparable to the loss of gross profits in a motion picture antitrust case. Leir specifically testified that overhead would not have increased had he sold vanadium products.

(R. 1110-1111.) The net profit figures of petitioners' overall business were erroneously excluded by the trial Court and this was assigned as error. (Pl. Ex. 121 for Id., R. 469.)

In summary the evidence showed as follows: (1) A decline in sales and profits after 1942 and a further showing of inability to produce, distribute or sell vanadium products. (Pl. Ex. 119, R. 2212, 1089; Pl. Ex. 120, R. 2213; R. 1094.) (2) Profits were made during the Apex period when petitioners had production. (Id.) (3) The spectacular comparison of the growth of sales of fluorspar. (Pl. Ex. 123 for Id. only, R. 536.) (4) The comparison of the growth of the Continental Ore Group in the post war period. (Pl. Ex. 124 for Id. only, R. 537, et seq.)

The jury would have had before it the complete balance sheets and profit and loss statements of the petitioners, the comparison of the free market aspects of their business as contrasted to the vanadium portion of their business, the production, sales and profits of respondents, the expert testimony of men such as Leir and Wolf (men with a proven ability to succeed), the production of Apex and its relation to the total production of ferrovanadium (Pl. Ex. 139 for Id. only, R. 543), the complete record of total production of ferrovanadium by respondents from 1939 to 1949 and the estimated loss of profits based on a gross profit percent of sales factor. (Pl. Ex. 141 for Id., R. 545.) Petitioners produced substantially more evidence than that upheld by this Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946)—the decline of sales, profits and values and the loss of sales, profits and values in the restrained market as contrasted with the free market.

Respondents place great reliance on *Herman Schwabe Inc. v. United Shoe Machinery Corp.* (2 Cir. 1962), 297 F.2d 906. But respondents successfully excluded petitioners net profit history upon which petitioners relied to establish damages and which the *Schwabe* case found lacking. (R. 1083-1088; 1095-1096; Pl. Ex. 121 for Id. only.)

Petitioners attempted to follow the standards set forth in this Court's opinions and in *William H. Rankin Co. v. Associated Bill Posters of U.S.* (2 Cir., 1930), 42 F.2d 152 and *Locke v. Stearns, Welch Grape Juice Co.* (4 Cir., 1917), 240 Fed. 114. Respondents objected below.

Petitioners' proof of damages thus closely followed cases specifically referred to and approved by the Second Circuit in the *Schwabe* case.

Petitioners did as the *Schwabe* case suggested in footnote 7. They took their actual proportions of production during the Apex period as contrasted to the production of respondents and projected this forward until 1949.

Mr. Wolf specifically testified that fluorspar afforded a reliable guide as to what vanadium sales might have been in the absence of restrictions. R. 855 stricken.

Unlike the plaintiffs in the *Schwabe* case, petitioners had a demonstrated production and sales record in vanadium which declined and became nil.

III

THE BIGELOW CASE REJECTED THE USE OF MINORITY VIEW "LEGAL CAUSE" CONCEPTS USED IN NEGLIGENCE CASES IN ACTIONS BASED ON THE INTENTIONAL INTERFERENCE WITH THE FREE MARKET AND A BREACH OF CONGRESSIONALLY IMPOSED DUTIES.

The plain issue before this Court in *Bigelow* was whether or not an illegal conspiracy to establish a fixed system of film distribution was the proximate cause of loss of patronage. The Seventh Circuit opinion specifically stated that the issue was one of the fact of damage. (150 F.2d 877.) It attempted to distinguish the *Story Parchment* decision on this ground. In the *Bigelow* case, the lower Circuit Court interpreted the *Story Parchment* and the *Eastman Kodak* cases in precisely the same manner as the respondents do here.

But this Court in *Bigelow* compared the private antitrust action to cases of intentional wrongdoing where upon the showing of liability, the doing of an intentional act plus impact or contact, the wronged party is to be placed in as good a position as if the wrong had not been done. Thus in *Martin v. Herzog* (126 N.E. 814, 228 N.Y. 164), cited by the learned Court below, Judge Cardozo specifically declared that the result would have been different if the defendants had run into the buggy purposely. (126 N.E. 816.)

In an intentional tort, damages are awarded for all the natural consequences of the wrongful act. To speak in terms of "causation" in such a setting by looking upon petitioners' business judgments as a superseding or intervening cause manifestly changes the private antitrust case from a case of judicial enforcement of legislative pro-

nouncement into a judicial analysis of a plaintiff's business judgment viewed from a hindsight position. But such an analysis assumes liability on the part of the defendants and, if applied, allows the wrongdoer to violate the anti-trust laws with impunity. We respectfully submit that a conspiracy to monopolize followed by predatory acts committed against the business of a competitor attempting to compete creates liability and the right to damages, based on relevant data, when it is shown that the competitor is unable to enter the market place after persistent and bona fide efforts and a prior history of sales and profits. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

IV

PETITIONERS' OFFER OF PROOF WAS SUFFICIENT TO PRESENT THE ISSUES TO THE COURT.

Respondents' argument as to petitioners' Offer of Proof concerning respondents' interference with petitioners' business in Canada is totally without merit.

From the first day of trial in this case, respondents took the position that petitioners could not offer any evidence on their elimination from the Canadian market. (R. 125.) The trial Court adopted this position and sustained any and all objections made by respondents concerning any reference to the Canadian exclusion. Counsel for respondent Carbide stated specifically that "the Canadian situation should not be a part of this lawsuit". (R. 801.) The Court agreed, and, as a result, excluded all references in

that respect. Now respondents claim that petitioners did not make a complete offer of proof because it lacked certain specifics which respondents themselves prevented petitioners from showing because they objected to the Canadian exclusion and any references to it.

Be that as it may, petitioners respectfully submit that the offer of proof by petitioners on the Canadian exclusion of petitioners showed what the substance of the proposed evidence was, which is all that is required in any offer of proof. *Iva Ikuko Toguri D'Aquino v. United States* (9 Cir. 1951), 192 F. 2d 338, 374.

The applicable rule was stated by this Court in *McCandless v. United States* (1936), 298 U.S. 342, 346, as follows:

> "An offer of proof cannot be denied as remote or speculative because it does not cover every fact necessary to prove the issue. If it be an appropriate link in the chain of proof, that is enough."

There is no question whatsoever in this case as to what petitioners offered to prove. The offer of proof speaks for itself and requires no analysis such as respondents give it in their briefs.

None of the cases cited by respondents in their briefs, particularly those appearing at page 48 of Respondent Carbide's brief, are in point. The cases cited there, with the exception of *Talon, Inc. v. Union Slide Fastener, Inc.* (9 Cir. 1959), 266 F. 2d 731, are cases where *no* offer of proof was made, which is not the case here. The *Talon* case involved a rejected offer to prove hypothetical prices, which is also not involved here. There was nothing hypothetical in petitioners' offer of proof.

It is illogical for respondents to argue that the offer of proof made as to the Canadian exclusion was ineffective because it was not complete in all minutiae in view of the fact that the applicable authorities hold that "a formal offer of proof is not necessary where the record shows, either from the form of the question asked or otherwise what the substance of the proposed evidence is" *Iva Ikuko Togari D'Aquino v. United States, supra,* at page 374; *Meaney v. United States* (2 Cir., 1940), 112 F. 2d 538. Cf. *Buckstaff v. Russell & Co.*, 151 U.S. 626 (1894).

As stated by Judge Frank in *Hoffman v. Palmer* (2 Cir. 1942), 129 F. 2d 976, 994:

> "Such an offer of proof, while provided for by Federal Rules of Civil Procedure, rule 43, 28 U.S.C.A. following section 723c (cf. 3 Moore's Federal Practice, 3076, 3077), is not absolutely essential, if it is otherwise entirely clear what the alleged error is. Meaney v. United States, supra."

It cannot be seriously questioned that this record shows clearly what the alleged error is and that the offer of proof more than adequately establishes the issue presented by the trial court's refusal to admit the Canadian evidence.

In addition, Mr. Arrouet's statements were admissible on various grounds:

(1) They were made by an agent who, petitioners showed, was prima facie authorized to speak for Electromet. 2 Mechem *On Agency* (2d ed.), §§ 1778, 1779; (2) They were statements made as part of the res gestae; i.e., to explain the conduct of Electromet in settlement of

petitioners' complaint and protest against Electromet. 2 Mechem *op. cit. supra* §§ 1781-1783; and (3) They were admissible as affirmative circumstantial evidence to show that petitioners were entitled to rely on Arrouet's statements in the conduct of their business.

The testimony in the record is uncontradicted that after petitioners registered a complaint to Electromet in New York, it voluntarily called petitioners and asked them to come in to discuss the complaint, telling them where to call and the person to whom they were to speak. Wolf followed their directions. Wolf knew Arrouet and it was respondents who designated him as the individual authorized to act and speak for them and to represent them in this matter.

General Finance, Inc. v. Stratford (D.C. Cir. 1940), 109 F. 2d 843 is squarely in point. In that case, the Court stated at page 843:

> "Appellant objected to this testimony, and contends that the statements of Hausenblus should have been excluded as hearsay. We think they were properly admitted against appellant, as admissions which appellant had authorized Hausenblus to make in its behalf. 'Where one person is sent by another to a third party for information in reference to an uncertain or disputed matter, the person sending is bound by the declarations of the party to whom he was referred, as if they were made by himself', i.e., they are admissible in evidence against him. Allen v. Killinger, 8 Wall. 480, 486, 487, 19 L. Ed. 470. 'The admissions of a third person are receivable in evidence against the party who has expressly referred another to him for information in regard to any uncertain or disputed fact.'" (Citing cases.)

This case is consistent with the holding in *State Farm Mut. Auto Ins. Co. v. Porter* (9 Cir. 1950), 186 F. 2d 834, in which the Court stated at pp. 841-842:

> "We believe a jury could well find as a fact that a person employed as a claim adjuster had at least apparent or ostensible authority to adjust claims and such would include negotiations for settlement. Special instructions as to what he was to do on this particular occasion, not divulged by him to the other party, would not constitute a limitation on his real or apparent authority . . . Where the special character of the agency is not known, and the principal has clothed the agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume" (Citing *Robinson v. American Fish & Oyster Co.*, 17 Cal. App. 212, 219, 119 P. 388, 389.)

See also *Johnson v. J. H. Yost Lumber Co.* (8 Cir. 1941), 117 F. 2d 53; Restatement of Agency (2d ed.), § 286.

It is fundamental that whether a person is an agent and the scope and extent of his authority are questions to be decided from all the facts and circumstances and that these questions are to be decided by the trier of fact. 2 *Am. Jur., Agency*, § 454; 2 *Mechem On Agency* (2d ed.) § 1785. At the very least, Arrouet's authority, as well as the scope of that authority, were questions which were properly determinable by the trier of fact under proper instructions by the Court. 2 *Am. Jur., Agency*, § 454.

V

THE CONSPIRACY OF RESPONDENTS TO MONOPOLIZE THE VANADIUM INDUSTRY AND TO ELIMINATE ALL COMPETITION, INCLUDING PETITIONERS', TOOK PLACE IN THE UNITED STATES. THE ELIMINATION OF PETITIONERS' CANADIAN CUSTOMERS BY PREVENTING PETITIONERS FROM EXPORTING VANADIUM INTO CANADA TOOK PLACE IN THE UNITED STATES. THE FACT THAT RESPONDENTS USED ONE OF THEIR CANADIAN SUBSIDIARIES WHICH HAD AN AGENCY AGREEMENT WITH CANADA TO ASSIST THE ELIMINATION DOES NOT GIVE RESPONDENTS ANTITRUST IMMUNITY.

A. The Sherman Act reaches the private use of lawful powers delegated by a foreign government when used to interfere with domestic commerce and stifle American industry pursuant to a conspiracy to create a monopoly in the United States.

The elimination of petitioners from Canada was merely part of an overall conspiracy to monopolize the whole vanadium industry. Even if petitioners' elimination from Canada were lawful, which it was not, since it was part of an illegal scheme to monopolize the whole industry, the entire combination and conspiracy is stricken down by the Sherman Act. (*United States v. Bausch & Lomb Optical Co.* (1944), 321 U.S. 707; *American Tobacco Co. v. United States* (1946), 328 U.S. 781, affirming 147 F. 2d 93 (6 Cir. 1944); *Aikens v. Wisconsin*, 195 U.S. 194 (1904). The record shows that the conspiracy started in 1933, long before any foreign government agency was involved, and continued on at least until the time of the complaint. Part of that over-all conspiracy was the elimination and destruction of petitioners' business, including shipments into Canada.

In spite of respondents' efforts to the contrary, petitioners repeat that this is not an action against the

Canadian government nor against the Office of Metals Controller of Canada. It is an action against two American companies for activity *in the United States* with the purpose of destroying petitioners' business in the United States. The conduct which created and brought about this specific result was carried out in the United States, by United States companies, by United States actors. The Canadian subsidiary, and its discretionary power to select the persons from which it would purchase vanadium were used by the illegal combination created and operated in the United States to insure the demise of petitioners. (Pl. Ex. 93, R. 451, 821.)

Respondents rely on *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), which involved the confiscation by the Costa Rican government of plaintiff's plantation and properties in Costa Rica. It is respectfully submitted that the limited holding in *American Banana* is not applicable to the facts of this case, and that *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), is controlling. In the *Sisal* case, this Court held illegal a conspiracy to monopolize foreign commerce in sisal. The Court noted that laws favorable to the Mexican agents in the conspiracy were solicited and secured from the governments of Mexico and Yucatan, and that the governments of both Mexico and Yucatan were persuaded to pass discriminatory legislation and all other buyers were forced out of the market. Despite this government involvement, the Court stated (p. 276):

> "Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importatio

and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. *True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.*" (Emphasis added.)

See also: *United States v. Aluminum Co. of America* (2 Cir. 1945), 148 F.2d 416; *United States v. Pacific and Arctic Railway & Navigation Co.*, 228 U.S. 87 (1913); *United States v. National Lead Co.*, 63 F.Supp. 513, (S.D. N.Y. 1945) aff'd 332 U.S. 319 (1947); *United States v. Timken Roller Bearing Co.*, 83 F.Supp. 284 (N.D. Ohio 1949), aff'd 341 U.S. 593 (1951); *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Sanib Corporation v. United Fruit Company* (S.D. N.Y. 1950) 135 F.Supp. 764; *In re Grand Jury Investigation of the Shipping Industry* (D.D.C. 1960), 186 F.Supp. 298, 319; *United States v. Imperial Chemical Industries* (S.D. N.Y. 1952), 105 F.Supp. 215.

B. An agent of a foreign country engaged in purchasing United States commodities is not afforded sovereign immunity. Manifestly if a government corporation is not afforded immunity a purely private commercial corporation cannot acquire immunity.

Respondents advance the claim of foreign governmental immunity. But the Canadian government's appointment

of Electromet of Canada to acquire vanadium products from the United States did not authorize it to carry out such purchases so as to restrain trade or monopolize trade in violation of the antitrust laws. *United States v. Deutsches Kalisyndikat Gesellschaft* (S.D. N.Y. 1929), 31 F.2d 199.

The claim of governmental immunity, we respectfully submit, seeks to attach governmental authority to bold practices which cannot be attributed to Canadian officials. Canadian officials referred the complaints of petitioners to Union Carbide's subsidiary Electromet in New York City. (Pl. Ex. 80, R. 438, 805.) The government of Canada through the Office of Metals Controller cannot be deemed to have had any knowledge of the agreements of the respondents to control and dominate the vanadium industry.

Respondents have not and cannot point to any evidence in the record showing that the Canadian government authorized Union Carbide to conspire with VCA to destroy petitioners, nor any ratification of that conspiratorial conduct. Petitioners offered to prove that the Canadian government was totally oblivious to the purpose for which Electromet of Canada decided not to deal with petitioners (R. 828-831) and offered to prove that Union Carbide, pursuant to its conspiracy with VCA, directed Electromet of Canada not to purchase from petitioners. (R. 826-828.) Whereas petitioners sold to Canadian customers prior to the appointment of Electromet of Canada (Pl. Ex. 79, R. 2174), after the appointment *only VCA and Union Carbide* were able to sell and ship to Canadian customers. (Pl. Ex. 17, R. 127, 133.)

Just like instrumentalities of the United States, corporate entities of foreign countries which do business in this country are subject to the laws of the United States, including the antitrust laws. (*United States v. Deutsches Kalisyndikat Gesellschaft* (S.D. N.Y. 1929), 31 F.2d 199; *Bank of U.S. v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1924); *Coale v. Societe Co-op Suisse des Charbons* (S.D. N.Y. 1921), 21 F.2d 180. Certainly, no foreign governmental immunity of any kind would attach to two private companies, Union Carbide and VCA, which used Electromet of Canada as part of an overall, preexisting conspiracy, to monopolize the vanadium industry.

C. Cases such as Parker v. Brown, 317 U.S. 341 (1943), holding that state action as distinguished from private action does not come under the antitrust laws are not in point.

In their answering briefs, respondents rely on such cases as *Parker v. Brown*, 317 U.S. 341 (1943), *United States v. Rock Royal Co-op*, 307 U.S. 533 (1939), *Olsen v. Smith*, 195 U.S. 332 (1904), and *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.* (5 Cir. 1954) 214 F.2d 413, which we respectfully submit are not applicable. Those cases advance the proposition that a legislatively-created monopoly is without the ambit of the antitrust laws and that *state action* as distinguished from private action does not come within the antitrust laws. Petitioners here are not seeking to invalidate any legislation on the ground that it violates the Sherman Act, nor are they seeking to undo the action of a state in creating a monopoly. For example, the *Parker* case was an injunction case seeking to enjoin official state action created by the legislature involving an overall detailed legislative program

adopted by the state. The *Parker* case itself recognizes that even a legislatively created monopoly is not *per se* outside the ambit of the antitrust laws. This Court stated (pp. 351-352):

> "There is no suggestion of a purpose to restrain state action in the Act's legislative history. . . ."
>
> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, [case cited]; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade [case cited]. . . ."

In the *Okefenokee* case, the Court found that the validity of the order involved could be attacked only in an action on mandamus, that there was no interstate commerce involved, and that the subject matter was exclusively within the jurisdiction of the administrative board. Furthermore, the later case of *Crammer Co. v. Du Pont* (5 Cir. 1955), 223 F.2d 238, cert. denied, 350 U.S. 848, from the same circuit, in effect explains away the *Okefenokee* case and clearly holds that a violation of the antitrust laws can occur even though the most important element of the conspiracy in attaining its objective is by secretly moving under the guise and protection of the public interest and through the public authorities.

D. Union Carbide and VCA are both liable for all injuries resulting from the overall conspiracy.

Again, this is an action against two private American companies which conspired to monopolize an industry and used a private Canadian corporation which had an agency

agreement with Canada to bring about the demise of the petitioners. There is no evidence in the record that any government authorized Union Carbide and VCA to conspire to monopolize the vanadium industry and to eliminate petitioners, and to insure the complete elimination by cutting off petitioners' right to ship their products into Canada. The elimination was caused by the American conspiracy, by the acts of private companies, by conduct taking place in the United States. VCA and Union Carbide both were members of that overall conspiracy and obviously both are responsible for any and all injuries resulting therefrom. The fact that one member of the conspiracy may have been the active partner in certain phases of the overall conspiracy does not insulate the other member. (*Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906).)

E. The Noerr case holds that the Sherman Act does not control joint action to lobby or to influence the passage of legislation.

As discussed in greater detail in petitioners' opening brief, it is respectfully submitted that the *Noerr* decision is not applicable to the facts of this case and was not intended to apply to the exclusion of competition accomplished under and pursuant to the terms of a conspiracy to monopolize an industry by predatory business tactics, even though part of the conspiracy included the use of the discretionary power to control purchases of vanadium given to one of the conspirator's Canadian subsidiaries by the Canadian government. Such traditional, predatory conduct has always been held to violate the Sherman Act and the *Noerr* decision has not changed this. Here there was an express showing of a classic divi-

sion of the market between respondents as to American production of vanadium and the in fact elimination of Mr. Leir's ability to continue as a competitor in vanadium both as to interstate and foreign commerce.

CONCLUSION

The trial Court committed error in excluding all evidence as to petitioners' elimination from Canada and in rejecting Petitioners' Offer of Proof in this regard. The trial Court clearly committed prejudicial error that cannot be corrected by return to the Ninth Circuit.

For the foregoing reasons petitioners respectfully request that the Court reverse the judgment entered herein and remand the action to the District Court for retrial.

Dated, April 12, 1962.

Respectfully submitted,

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